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Supreme Court, U.S.
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No. 96-12

In the Supreme Court of the United States

October Term, 1995

Ilene Thurman Hunter, on behalf of Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, Melissa Ilene Hunter, and Donovan Blaine Hunter,
Petitioners,

v.

Knoll Rig and Equipment Manufacturing Company, Ltd., (a Subsidiary of Dreco Group of Companies, Ltd.) and National Union Fire Insurance Company of Pittsburgh, PA.
Respondents,

v.

Fidelity and Casualty Company of New York,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this wrongful death-products liability case, the Fifth Circuit reversed a jury verdict in favor of petitioners, the surviving family of a derrickman who was crushed to death by 110,000 lb. of pipe that swarmed out of a racking board on a mobile rig manufactured by respondent KREMCO. Although KREMCO did not specify any grounds in support of two blanket Motions for Judgment as a Matter of Law made prior to the verdict, the Fifth Circuit held that the Trial Court erred in refusing to grant judgment as a matter of law on the issue of the reasonably anticipated use of the racking board under the Louisiana Products Liability Act, on the grounds that no reasonable jury could have found that the use of the racking board (which was being used to rack pipe in a common, albeit less than perfect, manner) was a use reasonably anticipated by the manufacturer. Thus, and despite the fact that other grounds existed under Louisiana law to support the verdict, including the existence of safer alternative designs and the existence of defective latches on the board, the Fifth Circuit reversed the jury verdict and rendered judgment in favor of defendants.

The Fifth Circuit's decision reversing the jury's verdict in favor of petitioners presents the following questions:

1. Whether the Fifth Circuit's decision granting judgment as a matter of law on an issue that was not specifically raised in pre-verdict motions for judgment as a matter of law is compatible with the Seventh Amendment to the United States Constitution; Fed. R. Civ. P. 50(a)(2); this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947) and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); and decisions of the Circuit Courts that

require pre-verdict motions for judgment as a matter of law to specify the grounds, facts and law in support of the motions.

2. Whether the Fifth Circuit's decision, in which the Court rendered judgment as a matter of law on a factual issue on which there was abundant evidence in plaintiffs' favor and substituted its factual findings for those of the jury, is consistent with the Seventh Amendment of the Constitution, the standards of review set forth by this court in *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and innumerable decisions of the Circuit Courts, and acceptable judicial procedure.

3. Whether the Fifth Circuit's decision, which reinstates the doctrine of contributory negligence as a bar to recovery in products liability suits in federal courts in Louisiana, contrary to Louisiana Supreme Court decisions and Louisiana law, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. §1652.

4. Whether the Fifth Circuit's decision, which conflicts with the terms of the Louisiana Products Liability Act, with scholarly commentary on the Act and with decisions of Louisiana courts on the issue of reasonably anticipated use, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

5. Whether the Fifth Circuit's decision, which misapplied settled Louisiana Products Liability law in failing to recognize that other grounds (including the findings of safer feasible alternative designs and defective latches) warranted the imposition of liability despite a finding of reasonably unanticipated use of the racking board, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

6. Whether the Fifth Circuit's decision, which will cause disparate results depending on whether products liability suits are litigated in Louisiana state or federal courts, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

7. Whether the Fifth Circuit's decision, which will promote removal of state court tort suits by defendants and unduly burden the federal courts with garden variety products liability suits, is consistent with sound policy, this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

8. Whether the Fifth Circuit's refusal to certify important questions on the interpretation of the Louisiana Products Liability Act to the Louisiana Supreme Court, as plaintiffs requested, contravenes this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

9. Whether the Fifth Circuit erred in refusing to find in favor of petitioners on their assignments of error on appeal relating to the proper allocation of liability and damages under Louisiana law.

RULE 14(b) STATEMENT

All parties in the Court of Appeals are listed in the caption of this case. Petitioners are not corporate filers, thus there are no parent or subsidiary companies to be listed under Rule 29.6.

CERTIFICATE OF INTERESTED PERSONS

The following persons and entities have an interest in this suit:

1. Ilene Thurman Hunter, individually and on behalf of the minor children, Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, Plaintiffs.

2. Donovan Blaine Hunter, Plaintiff

3. Knoll Rig & Equipment Manufacturing Co., Ltd., A Subsidiary of Dreco Group of Companies, Ltd., Defendant

4. National Union Fire Insurance Co. of Pittsburgh, PA, Defendant

5. Fidelity & Casualty Co. of New York, Intervenor-Plaintiff

6. Layne Royer, R. LAYNE ROYER, LTD., and Allen M. Posey, Jr., Attorneys of Record for Ilene Thurman Hunter, individually and on behalf of the minor children, Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, and Donovan Blaine Hunter

7. Ronald E. Raney, LUNN, IRION, JOHNSON, SALLEY & CARLISLE, Attorney of Record for Knoll Rig & Equipment Manufacturing Co., Ltd. and National Union Fire Insurance Co. of Pittsburgh, PA

8. S. Price Barker, COOK, YANCEY, KING & GALLOWAY, Counsel of Record for Fidelity & Casualty Co. of New York, Intervenor-Plaintiff

9. Phillips Petroleum Company

10. Mosley Well Service, decedent's employer.

11. William Kaufman, Attorney for Phillips Petroleum Company

12. Sydney Nelson, Attorney for Mosley Well Service

13. All present and future product liability claimants asserting a claim under the LPLA

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No. 96-12

In the Supreme Court of the United States

Ilene Thurman Hunter, et al.
Petitioners,
v.
Knoll Rig and Equipment Manufacturing Co., Ltd., et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Ilene Thurman Hunter, on behalf of Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter and Melissa Ilene Hunter, and Donovan Blaine Hunter, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (App. A-1) is reported at 70 F.3d 803. The Fifth Circuit's Per Curiam Opinion on Denial of Rehearing (App. A-38) is reported at 80 F.3d 136. The Ruling of the United States District Court for the Western District of Louisiana Denying Defendants' Motion for Judgment as a Matter of Law (App. A-26) is unreported.

JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on November 29, 1995. A timely petition for rehearing was denied on March 28, 1996 (App. A-38). The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII.
The Rules of Decision Act, 28 U.S.C. § 1652.
Federal Rule of Civil Procedure 38(a).
Federal Rules of Civil Procedure 50(a)(1) and 50(a)(2).
Louisiana Products Liability Act, La. R.S. 9:2800.51, *et seq.*
Louisiana Civil Code Article 2323.
(See Appendix H for Text)

STATEMENT OF THE CASE

Claude Hunter, Sr., a derrickman on a mobile oil rig, was crushed to death when 110,000 pounds of pipe swarmed out of a racking board on the rig, pinning him to the mast. Petitioners, the surviving family members of Mr. Hunter, brought the instant wrongful death-products liability suit against respondent, Knoll Rig & Equipment Manufacturing Company, Ltd., a Subsidiary of Dreco Group of Companies, Ltd. ("KREMCO") the manufacturer of the mobile rig and racking board, and its insurer, National Union Fire Insurance Co. of Pittsburgh, PA. Mr. Hunter's survivors alleged, pursuant to the Louisiana Products Liability Act, La. Rev. Stat. § 9:2800.51, *et seq.* (the "LPLA"), that Hunter's death was proximately caused by three unreasonably dangerous characteristics of the racking board manufactured by KREMCO, including: (1) defective design; (2) lack of warnings and instructions; and (3) breach of an express warranty.

After this action was filed against KREMCO in Louisiana state court, KREMCO removed it to federal district court based on diversity jurisdiction, 28 U.S.C. § 1332. Prior to trial, damages were stipulated at $1,384,187.00, and during a five day jury trial, the parties proceeded to try the case on liability alone.

The evidence at trial showed that on August 29, 1990, Claude Hunter and several other employees of Mosley Well Service were pulling tubing out of an existing well. Hunter's job as a derrickman required him to pull back the top end and vertically rack approximately 60 foot stands of tubing in the racking board attached to the mast (portable derrick) about 55 feet above the ground. Hunter was following his supervisor's order to tie the pipe back to the rear handrail using sash cord to secure it in the racking board (Tr. 102), which was a common practice when using racking boards that did not have retainers or keepers. The movement or vibration of the racking board during normal operations caused the rope-secured pipe to jerk against the handrail (Tr. 468-469, 871-873) and overload the latches, allowing the tubing to swarm out of the racking board and fall across the mast (Tr. 452). Hunter was killed when approximately 143 stands of 3 ½ inch tubing shifted or swarmed out of the racking board and fell toward or across the mast, pinning and trapping Hunter between the tubing and the side of the mast.

KREMCO designed and sold only one type of end-raked (fingers to the back of the racking board) racking board, with no retainers or keepers to hold pipe in the racking board (Tr. 249-250). The evidence showed (1) that racking boards for drilling rigs should be side raked (fingers to the side of the racking board, See Plaintiff's Exhibit 23.1), and (2) that the accident could not have happened in the manner it did with a side-raked racking board (Tr. 728, line 19 to Tr. 729, line 22). The evidence also showed there were other alternative feasible designs for end-raked racking boards to prevent Hunter's death. There was an alternative design

available that would have allowed the same pipe to be racked and secured in the racking board without developing any lean toward the mast.

Howard A. Elwell, an expert in the field of safety engineering, who received a BS degree in mechanical engineering from Purdue University in 1963, expressed an expert opinion that any mast or derrick manufacturer should have known that the "reasonably anticipated use" of that product included the hazard for shifting or swarming pipe to fall out of the racking board and across or into the mast or derrick (Tr. 394-419). The documentary evidence showed that pipe shifting or swarming and falling across the derrick or mast was a reasonably anticipated hazard of use that was or should have been well known to any rig manufacturer prior to the manufacture of this mast and racking board in June 1981, and that other rig manufacturers had reasonably anticipated uses that would cause pipe to swarm, and designed their racking boards to prevent pipe swarming.

After the close of plaintiffs' evidence, KREMCO moved for a directed verdict (judgment as a matter of law) without specifying any grounds therefor.[1] Thereafter, during the review of and objections to the jury instructions and jury

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[1] The entire colloquy on the initial motion was as follows:

> THE COURT: YOU HAD MADE REFERENCE, MR. RANEY, TO SOME MOTION, I BELIEVE, THAT YOU WANTED TO MAKE AT THE NEXT RECESS. THIS IS THE NEXT RECESS.
>
> MR. RANEY: YES, SIR, WE WOULD MOVE TO DISMISS AT THIS TIME ON A DIRECTED VERDICT, YOUR HONOR.
>
> THE COURT: ALL RIGHT, I'LL CONSIDER THAT MOTION AS HAVING BEEN MADE AND DENIED, AND WE WILL BE IN RECESS FOR THE NEXT 20 MINUTES TO ALLOW YOU TO PREPARE FOR YOUR CASE IN CHIEF.

verdict form, KREMCO did not object to the fact that the issue of reasonably anticipated use was being submitted to the jury. Tr. 759-785. At the close of the defendants' case, KREMCO did not renew its blanket motion for judgment as a matter of law. Tr. 846-847. At the close of all the evidence, prior to submission of the case to the jury, KREMCO re-urged its motion to dismiss, again without specifying any reasons,[2] and the court again denied the motion for judgment as a matter of law.

The jury returned a verdict in favor of the Hunters, specifically finding on the special verdict form that: (1) the racking board was unreasonably dangerous when it left KREMCO's control; (2) Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use; (3) Hunter's death was

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[2] After the close of the evidence, the following colloquy occurred:

> MR. RANEY: YOUR HONOR, JUST A COUPLE OF MATTERS BRIEFLY, IF I MAY.
>
> THE COURT: YES.
>
> MR. RANEY: FIRST OF ALL, SINCE YOU ALLOWED ARGUMENT ON MR. PERRAULT'S TESTIMONY, I PRESUME THAT THAT WAS REGISTERED AS AN OBJECTION BY ME IN THE RECORD?
>
> THE COURT: I CONSIDERED IT AS SUCH.
>
> MR. RANEY: THANK YOU. AND WE WOULD RE-URGE OUR MOTION AT THIS TIME FOR DISMISSAL.
>
> THE COURT: THE MOTION FOR JUDGMENT AS A MATTER OF LAW WILL BE NOTED AND DENIED AT THIS TIME. (Transcript at p. 891.)

caused also by his negligence; (4) the latches were unreasonably dangerous; (5) Hunter's death was caused also by an unreasonably dangerous characteristic of the latches; (6) R. L. Long was a cause of an unreasonably dangerous characteristic of the latches; (7) Mosley Well Service did not cause any unreasonably dangerous characteristic of the latches; and (8) Hunter's death was caused also by the negligence of Mosley Well Service employees. The jury assessed fault as follows: KREMCO 30%, Hunter 5%, Long 30%, and Mosley 35%.[3] Accordingly, under the court's calculations, petitioners were to recover 50% of the stipulated damages, approximately $652,000.00.

After the verdict, KREMCO filed a Motion for Judgment as a Matter of Law in which it raised for the first time the contention that the Jury's finding that the accident at issue occurred during a reasonably anticipated use of the racking board was erroneous as a matter of fact and law. The Trial Court, in a Memorandum Ruling dated July 22, 1994 (App. A-26), denied the motion.

The Hunters appealed the District Court's apportionment of damages against KREMCO. KREMCO cross-appealed, contending that the racking board was not being handled at the time of the accident in a manner reasonably anticipated by the manufacturer, and that it was not unreasonably dangerous.

In a two to one decision that the dissenting judge described as "aberrant," the Court of Appeals reversed the jury verdict and held that, as a matter of law, a reasonable jury could not have reached the conclusion that the use of the racking board on the evening of the fatal accident was a use that was, or should have been, reasonably anticipated by

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[3] R. L. Long Co. was defunct long before trial in this case, and accordingly petitioners did not file suit against that company or its former owner, R. L. Long, who is deceased. Mosley Well Service was decedent's employer, and was thus statutorily immune from tort damages.

KREMCO.[4] Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, which the Court, again in a two to one decision, denied. From the Fifth Circuit's decision, petitioners seek a writ of review.

REASONS FOR GRANTING THE WRIT

This case presents issues of urgent import, not only for the bereaved wife and children of Claude Hunter, who have been denied all recovery for his untimely death, but for every citizen of Louisiana who is compelled to litigate a products liability suit in federal court in Louisiana. Further, the decision raises serious constitutional issues regarding the right to trial by jury, conflicts with the prior jurisprudence of this Court and every other Circuit Court, violates the Federal Rules of Civil Procedure and the Rules of Decision Act, misinterprets and misapplies Louisiana law, and constitutes a gross departure from proper judicial proceedings.

In this products liability decision, which the dissenting Judge described as "aberrant," the Fifth Circuit reversed a jury's considered verdict and the trial court's denial of the defendants' motions for judgment as a matter of law, and rendered judgment for defendants, all on the factual issue of the "reasonably anticipated use" of the product, an issue that was never raised in defendants' pre-verdict motions for judgment as a matter of law. This decision is contrary to the Seventh Amendment to the United States Constitution; Fed.

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[4] In the course of its Opinion, the Court of Appeals stated that: "As it had at the close of the Hunters' case and of all the evidence, KREMCO moved for judgment as a matter of law on, inter alia, whether the accident occurred, as required by LPLA, during a "reasonably anticipated use" of the racking board." Opinion at 806. As demonstrated above, this assumption was clearly in error, because KREMCO never specified the basis for its blanket motions. Petitioners attempted to have the Court correct this error in a pleading requesting the court to void its judgment for lack of power and jurisdiction to rule on the sufficiency of the evidence. The Court refused to permit petitioners to file this pleading.

R. Civ. P. 50(a)(2); this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (67 S.Ct. 752, 91 L.Ed. 849); *Globe Liquor Co. v. San Roman,* 332 U.S. 571 (68 S.Ct. 246, 92 L.Ed. 177); and innumerable decisions of the Circuit Courts, which indicate that a Court of Appeals has no power to render a Judgment as a Matter of Law in a case where proper and specific motions are not presented. The only power that the Court had in this case was to determine whether there was "any evidence" to support the jury's verdict, and if not, to order a new trial.

Furthermore, even assuming that the defendants' objections to the sufficiency of the evidence had been preserved for review, as the dissenting Judge pointed out, there was abundant evidence from which the jury could reasonably conclude that the decedent and his employer's use of the pipe racking board to rack pipe (albeit in a less than perfect manner) was reasonably anticipated by the manufacturer. Several witnesses testified that racking pipe in the manner in which occurred on the evening of Claude Hunter's death, with a slight lean, was common and known to (and thus reasonably anticipated by) manufacturers, many of whom have designed safeguards on their products to prevent such incidents. As such, the Court of Appeals, in taking the case from the jury and substituting its own credibility determinations and findings of fact, completely ignored the proper standards of review of a jury verdict, in violation of: the Seventh Amendment to the Constitution; the decision of this Court in *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242 (1986); innumerable decisions of the Circuit Courts regarding the proper standard of appellate review of jury verdicts; and proper judicial procedure.

As if that were not sufficient, the Fifth Circuit has taken upon itself to decide issues of Louisiana Law raised by the recently enacted Louisiana Products Liability Act, in complete conflict with the terms of the Act; with the comments of the author of the Act, and with long-standing Louisiana law and

jurisprudence regarding comparative fault. Under the Fifth Circuit's decision, negligent use or any slight misuse of a product may now constitute an absolute bar to a plaintiff's recovery in a products liability case, despite the fact that Louisiana long ago legislatively abolished the doctrine of contributory negligence as a bar to recovery in tort cases, and the fact that the Louisiana Supreme Court has expressly held in controlling jurisprudence that contributory negligence is not a bar in products liability cases. In fact, oftentimes, based on policy reasons, Louisiana Courts will not even permit a plaintiff's comparative negligence to be used to diminish his recovery in products liability cases!

Petitioners respectfully submit, as the dissenting Judge observed, that the Fifth Circuit stepped in the jury box in this case. In the process, the Court has severely impacted Louisiana law on comparative fault, and caused a great disparity between cases that will be tried in federal as opposed to state court in Louisiana.

For these reasons, and other reasons that this Honorable Court may ascertain, petitioners respectfully urge this Court to issue a writ, review and ultimately reverse the judgment of the Fifth Circuit in this case.

A. THE COURT OF APPEALS WAS WITHOUT POWER TO REVERSE THE JURY VERDICT AND GRANT JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF REASONABLY ANTICIPATED USE, BECAUSE DEFENDANTS DID NOT PRESENT SPECIFIC MOTIONS FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF REASONABLY ANTICIPATED USE PRIOR TO SUBMISSION OF THE CASE TO THE JURY. THE DECISION CONTRAVENES THE SEVENTH AMENDMENT, VIOLATES FED. R. CIV. P. 50(A)(2), CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUIT

COURTS, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF PROPER JUDICIAL PROCEEDINGS AS TO MERIT REVIEW.

Although the Court of Appeals erroneously assumed otherwise (see n. 4, *supra*), defendants failed to make specific motions for judgment as a matter of law on the issue of reasonably anticipated use. In fact, the two motions defendants made, one at the close of plaintiff's case, and the other at the close of the evidence, failed to specify any factual grounds, any law, or any reasons at all in support of the motions. Tr. 532, 891, set forth in n. 1 and n. 2, *supra*. It was not until after the verdict was rendered that defendants filed a new motion for judgment as a matter of law contending that the evidence on the issue of reasonably anticipated use of the racking board was insufficient.

As such, the Court of Appeals erred in reviewing the sufficiency of the evidence on the issue of reasonably anticipated use, reversing the jury's verdict that the use was reasonable, and rendering judgment as a matter of law in favor of defendants on the issue of reasonable use. As discussed *infra*, the Fifth Circuit's decision granting judgment as a matter of law on an issue that was not specifically raised in pre-verdict motions for judgment as a matter of law contravenes the Seventh Amendment to the United States Constitution; violates Fed. R. Civ. P. 50(a)(2); is inconsistent with this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947) and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); conflicts with decisions of the Circuit Courts that require that pre-verdict motions for judgment as a matter of law specify the grounds, facts and law in support of the motions; and grossly departs from the accepted course of judicial proceedings, meriting the issuance of a writ.

1. Defendants' blanket pre-verdict Motions for Judgment as a Matter of Law were improper and insufficient.

Appellate review of a jury's factual findings is properly raised by a challenge to the Trial Court's disposition of a Rule 50 Motion for a Judgment as a Matter of Law (formerly a Motion for Directed Verdict or Motion for JNOV), filed at the close of the plaintiff's case and/or the close of the evidence, and renewed after the verdict is rendered. S. Childress, M. Davis, *Federal Standards of Review*, § 3.01, at 3-3 (2d ed. 1992).

Pursuant to the express terms of Rule 50(a)(2)[5], the commentators and the case-law, it is well settled that Motions for Judgment as a Matter of Law must be made prior to submission of the case to the jury and must specify the grounds therefor. As the official comments to Rule 50 state: "The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof..." Rule 50(a)(2), 1991 Advisory Committee Notes.

The commentators and the Circuit Courts uniformly agree: in making a motion for judgment as a matter of law, the movant must state the specific grounds for the motion, and, for purposes of preserving the movant's rights on appeal, the grounds are limited to those specifically stated. S. Childress, M. Davis, *Federal Standards of Review*, *supra*, at

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[5] Fed. R. Civ. Proc. 50(a)(2) provides: "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion **shall** specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." (emphasis added).

sec. 3.14, p. 3-142; *Hinojosa v City of Terrell,* 834 F.2d 1223, 1228 (5th Cir. 1988).

In the instant case, defendants did not specify any grounds for their motions before the district court, and the motions therefore were improper and insufficient.

2. Accordingly, the Court of Appeals erred in conducting a sufficiency review on the issue of reasonably anticipated use.

This Court has, on several occasions, held that the Courts of Appeal are without power to direct the entry of a judgment notwithstanding the verdict when a party fails to proceed in accord with the procedures set forth in Rule 50. See, e.g., *Globe Liquor Co. v. San Roman,* 68 S.Ct. 246, 332 U.S. 571, 92 L.Ed. 177; *Cone v. West Virginia Pulp & Paper Co.,* 67 S.Ct. 752, 330 U.S. 212, 91 L.Ed. 849 (1947.) Indeed, absent a motion for directed verdict, judicial reexamination of the evidence abridges a plaintiff's Seventh Amendment right to trial by jury. *Fineman v. Armstrong World Industries, Inc.,* 980 F.2d 171 (3d Cir. 1992) *rehearing denied, certiorari denied* 113 S.Ct. 1285, 122 L.Ed.2d 677 (1993). The same rationale should apply in cases, such as the instant case, where the motions are insufficient and improper.

In innumerable decisions of the Circuit Courts, the Courts hold that where the grounds for a motion for directed verdict or judgment as a matter of law are not specified, the unspecified issues are not preserved for review, and the Court of Appeals has no power to review those issues. See, e.g., *Lewis v. Kendrick,* 944 F.2d 949 (1st Cir. 1991); *Railway Exp. Agency, Inc. v. Epperson,* 240 F.2d 189 (8th Cir. 1957); *Jones Truck Lines, Inc. v. Argo,* 237 F.2d 649 (8th Cir. 1956); *Stilwell v. Hertz Drivurself Stations,* 174 F.2d 714 (3d Cir. 1949); *Friedman v. Decatur Corp.,* 135 F.2d 812, 77 U.S.App.D.C. 326 (D.C. Cir. 1943); *Maryland Cas. Co. v.*

Talley, 115 F.2d 807 (5th Cir. 1940); *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1949).

In instances where the complaining party on appeal fails to challenge the sufficiency of the evidence before the lower court, the jury's findings alone are not subject to appellate review, because "Federal Courts simply do not directly review jury verdicts." *Coughlin v Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). Under such circumstances, the Court's inquiry "is limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency..." *Id., citing American Lease Plans, Inc. v Houghton Construction Co.*, 492 F.2d 34, 35 (5th Cir. 1974) (per curiam); *Little v Bankers Life & Casualty Co.*, 426 F.2d 509, 511 (5th Cir. 1970.) *Accord, Merchant's National Bank Southeastern Fire Ins. Co., Inc.*, 854 F.2d 100 (5th Cir. 1988); *Stewart v Thigpen*, 730 F.2d 1002, 1007 (5th Cir. 1984).[6]

Considering that the defendants did not make the proper sufficiency motions on the issue of reasonably anticipated use under Fed. R. Civ. P. 50(a)(2) in the instant case, the Court of Appeals erred in reviewing the jury's verdict that the use was reasonably anticipated, reversing the jury's factual finding that the use was reasonably anticipated, and granting a judgment as a matter of law on the issue. The Court's review should have been limited to the determination whether there was "any evidence" to support the jury's factual determination that the use of the racking board was reasonably anticipated. As discussed in detail *infra*, there was abundant evidence that the racking board was used in accord

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[6] Even if a reviewing Court does find, under this extremely strict standard, that there is no evidence supporting a finding, it is limited in the actions it may thereafter take. In such a situation, the Court of Appeal cannot reverse and render; rather, it must reverse and remand for a new trial. *See, Zervas v Faulkner*, 861 F.2d 823, 829, n.9 (5th Cir. 1988); *Hinojosa v City of Terrell*, 834 F.2d 1223, 1228 (5th Cir. 1988); *Smith v Trans-World Drilling Co.*, 772 F.2d 157, 160 (5th Cir. 1985.)

with its reasonably anticipated use. Thus, under proper application of the law and settled judicial procedure, the verdict should have been affirmed.

B. ADDITIONALLY, THERE WAS ABUNDANT EVIDENCE IN PETITIONERS' FAVOR ON THE ISSUE OF REASONABLY ANTICIPATED USE, AND THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS FACTUAL FINDINGS FOR THOSE OF THE JURY. THE COURT'S DECISION VIOLATES THE SEVENTH AMENDMENT; CONTRAVENES THIS COURT'S DECISION IN *ANDERSON V LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986); CONFLICTS WITH DECISIONS OF THE CIRCUIT COURTS REGARDING WELL SETTLED STANDARDS OF APPELLATE REVIEW; AND CONSTITUTES AN EXTREME DEPARTURE FROM PROPER JUDICIAL PROCEDURE, MERITING A WRIT.

Even assuming, but not conceding, that defendants properly preserved the issue of reasonably anticipated use for appeal, there was, as the dissenting judge recounted, abundant evidence to support the jury's verdict that Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use. As such, under the proper standards of appellate review of jury verdicts, the Court of Appeal, in deciding that the use of the racking board was not reasonably anticipated, erred in substituting its own factual findings for those of the jury, and usurping the jury's function. As discussed *infra*, the decision conflicts with the Seventh Amendment to the United States Constitution, with this Court's decision in *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) and progeny, and with innumerable decisions of the other Circuits, meriting a writ.

As Judge Benavides aptly noted in his strong dissent in this case, the standard of review of jury verdicts is very strict.

The court must view all of the evidence in favor of the prevailing party. The jury's decision must be accepted if the record contains any competent evidence tending to support the verdict. Dissent, at 811, *citing Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1326 (5th Cir. 1995); *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1178 (5th Cir.1992). "If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial contradictory evidence that could have supported an opposite verdict." Dissent, at 811 *quoting Gibraltar Sav. v. LD Brinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir.1988), *cert. denied*, 490 U.S. 1091, 109 S.Ct. 2432, 104 L.Ed.2d 988 (1989), *accord Knowlton*, 957 F.2d at 1178.

The appellate court cannot substitute its own judgment by weighing conflicting evidence or inferences, or by making credibility determinations. S. Childress, M. Davis, *supra*, at § 3.05, p. 3-49. In all cases "...it is the function of the jury as the traditional finder of fact, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing Co. v Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). *Accord, Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986.)

Indeed, as Judge Benavides observed, the majority in the instant case lost sight of this standard. The jury found that Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use. Given the strict standard of appellate review, the Court was required to uphold that verdict if there existed evidence in the record to support that conclusion, even if there was substantial evidence to the contrary. In this case, there was abundant evidence that racking with negative lean itself is common and the overall use of the racking board was routine, and the jury's decision to credit that evidence and testimony should not have been overturned.

In this case, the majority came to the conclusion that the pipe was racked with such an "unreasonable" and "dangerous lean" toward the mast that the "danger" of falling pipes was "certainly obvious to the experienced workers at Mosley Well Service". To make this finding of fact, the majority relied upon the deposition testimony of Eric Beavers (Beavers was killed in a drilling rig accident prior to trial) that was taken on August 24, 1992, almost two (2) years after Hunter was killed racking the pipe. In his deposition, Beavers characterized the lean of the pipe as "ridiculous", but Eric Beavers signed a written statement the day after Hunter was killed stating "Maybe the angle of racking wasn't enough." and "Pipe could have started sliding from bottom and fell against derrick." (Tr. 888).

It was the province of the jury to weigh and evaluate Beavers' inconsistent statements to determine what was the truth. Likewise, it was the province of the jury to determine whether the lean of the pipe was unreasonably dangerous, and whether this function (use of the racking board to store and secure pipe, some of which had started leaning toward the mast) should have been reasonably anticipated by the manufacturer, and whether, and to what degree, the workers should have known they were in danger because some of the pipe was leaning toward the mast.

Kenneth Kaigler, an expert in the field of rig operations and safety, testified that Hunter was doing nothing wrong because he could not appreciate any danger without knowing this particular handrail was not designed to secure tubing (Tr. 358-361). He further testified that he has no problem with the pipe leaning toward the mast if it is properly retained (Tr. 359). The majority seized on Kaigler's statement that "It's not a common deal, but I have seen it" to support their finding of fact that this was not an expected "common" manner of use of the racking board. Despite the fact that it was the jury's province to credit or discredit testimony, the majority gave Kaigler's one statement greater weight than the statements of

three fact witnesses (Ray, Berry and Willoughby) who presented testimony from which the jury could determine that this was a "common" use of the racking board. In addition, the majority disregarded Kaigler's other testimony:

Q. Do you have an opinion about what Claude Hunter was doing that night, whether he was doing anything wrong?

A. I did not see any information or heard any information to indicate to me that Hunter was doing anything wrong. (Tr. 359, lines 2-6)

Q. Now, is there any way that Claude that night could have known what the forces were, the amount of forces that were being put on the back handrail?

A. No, sir.

Q. Did Claude, to your knowledge, have any way of knowing that KREMCO's board was designed, KREMCO's racking board was designed so the back handrail was not supposed to have pipe tied to it?

A. No, Sir. (Tr. 359, lines 17-25).

Moreover, at trial, rig operator Danny Ray testified that pipe is always tied to the back handrail. Ray also examined a diagram showing negative leaning pipe and testified as follows:

Q: In looking at this diagram, Mr. Ray, in looking at the way this pipe is racked, is this something that is common to you or at least seen by you out there in your work as an oil well service operator?

A: Yes, sir. Just about any time you trip pipe it always--it's tight at the bottom, but as you (sic) collars butt up against one another you're coming out of it, it mushrooms at the top. Kind of flares out. Gets bigger.

On cross examination, in direct response to whether it is common practice to lean pipe toward the mast, Ray testified: "You have to kind of do it the way you--to get the job done, you know? Not all wells are perfect and you just kind of gotta do the job the best you can. If you're tripping 12 or 14 thousand foot of pipe and you can space out the bottom some and it will throw some lean back in it once the pipe starts getting too much on you." Further, on redirect Ray was asked: "You have racked pipe with it leaning towards the mast before, haven't you?" Ray responded, "Yes, sir, I have."

In addition to Ray's testimony, rig operator Charles Berry testified that when they started tripping the pipe the workers used three to four inches of positive lean. He confirmed that pipe is always tied to the handrails. He examined the same exhibit showing negative leaning pipe that Ray described as commonplace and testified that the pipe looked the same way on the day of the accident.

On cross-examination, Berry was asked: "It's true, isn't it, Mr. Berry, that that handrail isn't meant to take the weight of all that pipe, is it; isn't that true?" Berry replied: "I'm going to put it like this if I may, I have tied pipe to handrails every time I have ever worked derricks on a drilling rig or a workover whether it's from the side handrail or the back handrail." In addition to Ray's testimony that pipe was always tied to the back handrail and Berry's testimony that he always tied to a handrail, derrickman Kenneth Willoughby was asked, "How have you secured pipe in the racking board in your 18 years of experience when there wasn't a chain up there to secure it in the racking board?" Willoughby responded: "Tie it off with sash cord or some kind of rope to your back handrail." The majority even conceded that "[a]ccording to the testimony, however, pipes are often tied to the back handrail." Op. at 805 n. 1.

Thus, despite the Court of Appeals' fact-finding that the use of the racking board was not common, there remains the testimony of Ray, Berry and Willoughby that a jury could find

credible and conclude that the racking board was being used in a manner that was common.

As the dissenting judge stated, viewing the record in the light most favorable to the verdict, there was credible evidence that the jury could credit that negative lean itself is common. Moreover, properly viewed in context, the overall use of the racking board was routine. The jury found that Hunter's death occurred during a reasonably anticipated use of the racking board. Judge Benavides aptly noted: "I would stay out of the jury box and affirm."[7]

The Fifth Circuit, in taking the issue away from the jury, usurped the function of the jury and petitioners' right to the jury's decision. This aberrant decision merits a writ.

C. THE FIFTH CIRCUIT'S DECISION CONTRAVENES AND MISAPPLIES LOUISIANA JURISPRUDENTIAL AND STATUTORY LAW, IN CONFLICT WITH THIS COURT'S DECISION IN *ERIE V. TOMPKINS* AND THE RULES OF DECISION ACT, 28. U.S.C. § 1652.

Under this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and progeny, and the Rules of Decision Act, 28 U.S.C. § 1652, federal courts sitting in diversity must apply

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[7] Judge Benavides further observed that there was ample evidence to support the jury's verdict that the racking board was unreasonably dangerous:

> ...there was expert testimony of alternative designs and safety mechanisms, existing at the time of manufacture of the racking board at issue, which would have prevented Hunter's death. This evidence not only supports the jury's conclusion on an unreasonably dangerous product, but provides additional evidence from which a reasonable jury could conclude that the manufacturer should have anticipated negative lean; it appears that other manufacturers did.

the laws of the state in which they sit, including its statutes, in deciding controversies. This rule was intended to secure uniformity of decisions within each state so that cases dependent upon state law would not be decided differently according to whether they are before federal or state courts. *King v. Order of United Commercial Travelers of America,* 68 S.Ct. 488, 333 U.S. 153, 92 L.Ed. 608, *rehearing denied* 68 S.Ct. 900, 333 U.S. 878, 92 L.Ed. 1153 (1948). The two aims of the *Erie* rule are the discouragement of forum-shopping and the avoidance of inequitable administration of the laws. *Hanna v. Plumer*, 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8 (1965.)

As discussed in detail, *infra,* the Fifth Circuit has interpreted the Louisiana Products Liability Act §9:2800(52)(A) requirement of "reasonably anticipated use" contrary to the Act, the intention of its drafters, and decisions of the Louisiana courts. Moreover, in determining that the issue of "reasonably anticipated use" is the threshold issue in products liability cases (thereby refusing to recognize that other grounds, including safer feasible alternative designs, also warranted the imposition of liability in this case) the Court ruled contrary to Louisiana law and decisions of Louisiana Courts. Finally, and most egregiously, the Court has ignored both controlling decisions of the Louisiana Supreme Court and Louisiana's Comparative Fault law, codified in La. Civil Code article 2323, which expressly state that contributory negligence can nevermore bar a plaintiff's recovery in tort cases—The most a court may reduce a plaintiff's recovery in Louisiana is by the percentage of his own comparative negligence.

Petitioners respectfully submit that the Fifth Circuit's decision decides vitally important questions of law contrary to the settled jurisprudence and express laws of Louisiana. Further, the decision will cause inequitable and diverse administration of the laws and forum shopping (e.g., removal efforts) by defendants. The decision contravenes the well

settled rule of *Erie R. Co. v Tompkins* and progeny and the Rules of Decision Act, meriting the issuance of a writ.

1. **The Fifth Circuit's interpretation of La. Rev. Stat. 9:2800(52)(A) conflicts with the terms of the Louisiana Products Liability Act, with commentary on the Act by its co-drafter, and with decisions of the Louisiana courts.**

The Louisiana Products Liability Act, in § 9:2800.54(A), provides that:

> The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

"Reasonably anticipated use" is defined as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." La. Rev. Stat. Ann. § 9:2800.53(7).

In the instant case, the Fifth Circuit interpreted the term "reasonably anticipated use" to mean "common use."[8] The court concluded that the manner in which the pipe was being racked in this case, with a negative lean, was not "common," and therefore could not have been reasonably anticipated by the manufacturer, KREMCO. Further, the Court implied that negligent use or misuse could never be a reasonably anticipated use.

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[8] Although the Court appeared to retreat somewhat from this position in its denial of rehearing, petitioners suggest that the damage is still done, and that the Court's shift provides no help for the family members of the decedent, Claude Hunter.

In holding that a "reasonably anticipated use" of a product must be a "common" use of that product, and that misuse could never be actionable, the Court of Appeals failed to follow the LPLA and controlling Louisiana product liability jurisprudence.

John Kennedy, who, along with Professor H. Alston Johnson, III, drafted the LPLA, stated in his article, *A Primer on the Louisiana Products Liability Act*, 49 La.L.Rev. 565 (1989), that:

> The fourth element of an LPLA cause of action set forth in section 2800.54(A) also departs from prior law but only in one respect. This, as mentioned, is by substituting 'reasonably anticipated use' for 'normal use.' The purpose of both terms is to express the types of product **uses and misuses** by a consumer that a manufacturer must take into account when he designs a product, drafts instructions for its use and provides warnings about the product's dangers in order that the product not be unreasonably dangerous." *Id at* 584. (emphasis added.)

In support of this statement, Kennedy, the co-drafter of the LPLA, cited *Bloxom v Bloxom*, 512 So.2d 839 (La. 1987), a Louisiana Supreme Court case wherein the Court discussed the term "normal use." The Supreme Court therein stated:

> "Normal use" is a term of art that includes all intended uses, as well as all foreseeable **uses and misuses** of the product. *Rey v. Cuccia*, 298 So.2d 840 (La.1974); *Branch v. Chevron Oil Co., Inc.*, 681 F.2d 426 (5th Cir.1982); *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985 (5th Cir.1980).

Bloxom, 512 So.2d at 843 (emphasis added.) In accord are post LPLA decisions such as *Hoyt v. Wood/Chuck Chipper Corp.*, 651 So.2d 1344 (1st. Cir. 1995) *cert. denied* 654 So.2d

695 (La. 1995) and *Johnson v. Chicago Pneumatic Tool Company*, 607 So.2d 615, 617 (La. App. 1st Cir.), *writ denied*, 608 So.2d 1009 (La.1992).

It may be true, as a few intermediate state courts have opined,[9] that the term "reasonably anticipated use" is narrower than prior jurisprudential definitions allowing recovery for all conceivable misuses of a product. However, in determining that any negligent use or misuse of a product cannot be a "reasonably anticipated use," the Court ignored not only the words of the co-drafter of the LPLA, but also the Louisiana cases that state that misuse is actionable, and other cases that help define the term "reasonably anticipated use."

Daigle v. Audi of America, Inc., 598 So.2d 1304 (La. App. 3d Cir. 1992), relied upon by the Court, provides a discussion of reasonably anticipated use. However, the examples cited in the comments to that case (the same examples cited by Kennedy, *supra*) show that reasonably anticipated uses envisioned by the drafters of the legislation spoke to the "function" of the product: a manufacturer should not have to anticipate that a coke bottle will have to "function" as a hammer; a manufacturer should not have to anticipate an automobile will have to "function" as a boat; a manufacturer should not have to anticipate body perfume will have to "function" as a scent for a candle.[10]

In the instant case, plaintiff was using the racking board in accord with its intended function, to rack pipe, and not some other bizarre and unintended function. Thus, the legal

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[9] Interestingly, recent intermediate state court decisions have cited federal Fifth Circuit cases as authority for their conclusions!

[10] Even so, *Daigle* does not discuss whether under the LPLA these facts would create an issue for a jury, because the case was tried to a judge, who dismissed the case. On affirming the lower court's ruling, the appellate court was very careful to point out the substantial differences in the standards between reviewing a directed verdict and a judgment notwithstanding the verdict in a jury trial, and a motion for involuntary dismissal in a judge trial.

test created by the Court will overturn a line of jurisprudence where the employee's negligent manner of use of the product was not the "common" manner of use of the product, but the product was being used to perform a function for which it was designed when the unreasonably dangerous design caused injury to the employee, emanating from *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La.1985) and *Robertson v. Superior PMI, Inc.*, 791 F.2d 402, 407-08 (5th Cir.1986).

None of the cases cited by the majority support or suggest that "reasonably anticipated use" should be interpreted to mean "common" use as a standard to recover damages caused by an unreasonably dangerously designed product under the LPLA. And, neither the law, the commentary or the cases suggest that negligent use or misuse can never be a "reasonably anticipated use."

As Judge Benavides recognized in his dissent, because this case did not involve use of a product for a different function than intended, such as using a soda bottle as a hammer or driving a car across water, but rather for racking pipe, as the manufacturer intended, the issue of the alleged negligent use of the racking board spoke to the workers' comparative fault, not to the issue of reasonably anticipated use.[11] As such, the Court should not have decided that the workers' alleged fault barred plaintiffs' recovery.

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[11] Judge Benavides noted:

> The evidence at trial reflects that the pipe was initially being racked with positive lean. It was secured to the back handrail as was common. As the pipe was being racked, it grew larger as expected. As a result, there was negative lean. At this point, the workers negligently failed to correct the lean. This failure, however, does not lead to the conclusion that the overall use of the board was not a reasonably anticipated one. Rather, the workers' failure to correct the lean speaks to their comparative fault. The jury clearly understood this and found both Hunter and his co-workers partially at fault. The workers' negligence should not, however, insulate KREMCO from its own fault. Viewing the

2. The Fifth Circuit's decision misapplies Louisiana Products Liability law in failing to recognize that other grounds (including safer feasible alternative designs and defective latches) warranted the imposition of liability despite a finding of unanticipated use of the racking board.

The Fifth Circuit, in essence, held that the threshold issue (first step) in a products liability case is to determine the reasonably anticipated "common" use of the product. If the product is not being used in a "common" manner by the user, then this manner of use is not a reasonably anticipated use of the product, and the claim should be dismissed even though the product is unreasonably dangerous. Using this analysis, a Court can or must disregard or ignore any unreasonably dangerous characteristic of a product that proximately causes death or serious injury to a user while the product is being used for a function for which it was designed, unless the Court first determines the "reasonably anticipated use" of the product by the user, as a matter of law, is the expected "common" manner of use of the product.

Thus, the Fifth Circuit has created a legal test that will cause the dismissal of most pending product liability cases before the cases ever reach the jury, even if the claimants can prove there existed at the time of manufacture an alternative feasible design that was capable of preventing the death or injury. None of the cases cited by the majority suggest that reasonably anticipated use should be interpreted to mean "common" use as a standard to recover damages caused by an unreasonably dangerous designed product under the Louisiana Products Liability Act.

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entire context of the use of the racking board prior to the accident, a reasonable jury could conclude that it was being used in a manner that was reasonably anticipated by the manufacturer.

Further, Louisiana cases have recognized that plaintiffs may prove either that the product was unreasonably dangerous in its reasonably anticipated use or that there existed a feasible alternative safer design. For example, in *Delphen v. Dept. of Transp. & Dev.*, 657 So.2d 328 (La. App. 4th Cir. 1995) *writ denied* 663 So.2d 716, 717 (La. 1995), the Court stated:

> Plaintiffs must prove that a product is defective if it is unreasonably dangerous in its reasonably anticipated use **or** that there existed, at the time of the manufacture, a feasible alternative design capable of preventing the injury. La. R.S. 9:2800.54(A) (emphasis added).

The Fifth Circuit majority opinion is inconsistent with the Fifth Circuit and Louisiana cases interpreting the LPLA. No case has adopted the legal test (threshold issue of reasonably anticipated use) espoused by the majority. If the opinion is allowed to stand, it will cause a great injustice to many present and future pending product liability claimants whose claims are dismissed because the user was not using the product in a reasonably anticipated "common" manner. This is true even if it can be proved that the unreasonably dangerous design of the product proximately caused death or injury, and there existed at the time of manufacture an alternative feasible design that was capable of preventing the death or injury.

3. The Fifth Circuit's decision reinstates the doctrine of contributory negligence as a bar to recovery in federal courts sitting in Louisiana, in direct contradiction to Louisiana Supreme Court decisions and Louisiana law of comparative fault.

The majority decision held that negligent use or misuse of a product is not a "common" or reasonably anticipated use of the product under the LPLA, and determined that the issue whether the use was "common" or reasonably anticipated by the manufacturer was the *threshold issue* in products liability

cases under the LPLA. As such, if a plaintiff is found to have been negligent in the use or misuse of a product, even one that is unreasonably dangerous, his recovery will be completely foreclosed.

As such, the Fifth Circuit has effectively resurrected the long deceased doctrine of contributory negligence in Louisiana. This unfortunate decision ignores well reasoned decisions of Louisiana's highest court holding that contributory negligence is not a bar to recovery in products liability cases, e.g., *Bell v. Jet Wheel Blast, Div. of Ervin Industries*, 462 So.2d 166 (La. 1985),[12] and progeny, and emasculates Louisiana's comparative fault law, as set forth in La. Civil Code Article 2323.

In *Bell, supra,* the Louisiana Supreme Court considered the following question of law certified by the Fifth Circuit:

> "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'product liability?' "

Bell, supra, 467 So.2d at 168.

The Supreme Court, per Justice Dennis, answered the Fifth Circuit's question in the negative, holding that, after the 1979 adoption of Louisiana's comparative fault law, contributory negligence could not bar a plaintiff's recovery in products liability or any other tort cases in Louisiana. Under article 2323:

> [A] plaintiff's claim for damages no longer can be barred totally because of his negligence. At

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[12] The scholarly and well reasoned decision in *Bell v Jet Wheel Blast, supra,* which remains good law in Louisiana, was authored by former Justice Dennis of the Louisiana Supreme Court, who was recently appointed as Judge on the United States Court of Appeals for the Fifth Circuit.

> most his claim may be reduced in proportion to his fault. Thus, the net effect of article 2323, as amended, is to prevent the courts from applying any defense more injurious to a damage claim than comparative negligence. *Bell, supra,* 467 So.2d at 170 (emphasis added).

The *Bell* Court further stated that:

> Contributory negligence as a complete bar to recovery does not apply in products liability cases because it is incompatible with that doctrine. The contributory negligence defense would permit the manufacturer to breach his duty to manufacture a reasonably safe product and escape liability simply because the fault of the user of the defective product contributed to the accident. Thus, in many instances the manufacturer would have no incentive to make and market a safer product, and the user who is usually less able to distribute the loss would be forced to absorb even the portion of the damages attributable to the unreasonably dangerous condition of the manufacturer's product.

Bell, supra, 467 So.2d at 171 (emphasis added).

Furthermore, the *Bell* Court went on to note that comparative fault may apply in some but not all products liability cases according to the facts of the case and policy considerations, and declined to apply the doctrine to reduce the plaintiff's recovery:

> The principle [of comparative fault] does not apply, however, and the plaintiff's recovery cannot be diminished in a case such as the present one involving an industrial accident resulting in injury to an employee's hand due to defective machinery and the employee's ordinary contributory negligence. Under these

> circumstances the application of comparative fault would tend to defeat the basic goals of strict products liability without providing any additional incentive for careful product use.

Bell, supra, 467 So.2d at 173 (emphasis added).

The Court of Appeal in this case seemed to recognize some of the problems it was creating, when it stated in Footnote 2 (after criticizing the Louisiana Supreme Court's still valid decision in *Bell v Jet Wheel Blast, supra,* and apparently mis-stating the Kennedy article, *supra*) that "We recognize that there may well be inherent conflicts between liability under the LPLA and comparative fault." At the very least, this case presents vital issues on the interpretation of the LPLA and the application of comparative fault under the LPLA that should be determined by the Louisiana Supreme Court, and not the federal court of appeal.[13]

CONCLUSION

The Court of Appeals had no power to review and reverse the jury's verdict finding defendant KREMCO liable for Claude Hunter's death. The factual issue on which the Court reversed (the question whether the use of the racking board to rack pipe was a use that was reasonably anticipated by the manufacturer) was not raised in either of defendants' pre-verdict motions for judgment as a matter of law, as required by the Seventh Amendment, Fed. Rule Civ. Proc.

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[13] Plaintiffs requested, in their application for rehearing in the instant case, that the Fifth Circuit certify the question to the Louisiana Supreme Court, to let it decide the proper interpretation of the LPLA. The Fifth Circuit denied plaintiffs' request, and called the plaintiffs' request "belated." However, plaintiffs had no way to know that the Court would render such an astounding decision. And, interestingly, it appears that the Fifth Circuit's question in *Bell v. Jet Wheel Blast, Div. of Ervin Industries*, 462 So.2d 166 (La. 1985), which the Court's opinion avoids, was certified after the rendition of the original opinion. Rather than determining a critically important issue in Louisiana law on its own, and doing so contrary to the weight of authority, certification would have been the preferable course.

Rule 50(a)(2), this Court, and innumerable decisions of the other Circuits. Moreover, the issue presented a consummate and disputed question of fact on which there was abundant conflicting evidence. As such, the Court of Appeals usurped the function of the jury as fact-finder, in contravention of the Seventh Amendment, decisions of this Court and the other Circuits, and well settled principles of appellate review.

In addition, the Court of Appeals' decision, which failed to apply Louisiana law and jurisprudence, was improper and extremely prejudicial to those Louisiana products liability plaintiffs who will be forced to litigate in federal court. Moreover, the decision abrogates the doctrine of comparative fault and revives the doctrine of contributory negligence in products liability cases in Louisiana, contrary to settled Louisiana law and jurisprudence.

Petitioners respectfully submit that the Fifth Circuit's decision decides vitally important questions of law contrary to the settled jurisprudence and statutory laws of Louisiana. Further, the decision will cause inequitable and diverse administration of the laws and forum shopping (removal efforts) by defendants.

Accordingly, petitioners pray that a writ issue to review the decision of the Fifth Circuit in this case, and that the decision ultimately be reversed and remanded to the Fifth Circuit to decide the remaining issues on appeal.

Respectfully submitted,

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June 26, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40822

FILED
NOV 29 1995

ILENE THURMAN HUNTER, obo Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, and Donnovan Blaine Hunter,

Plaintiffs-Appellants-
Cross-Appellees,

versus

KNOLL RIG &
EQUIPMENT MANUFACTURING CO. LTD.,
A Subsidiary of Draco Group of Companies, Ltd., Et Al.,

Defendants-Appellees-
Cross-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

RECEIVED
NOV 30 1995

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

In this Louisiana wrongful death products liability acton against a manufacturer, and arising out of a drilling rig accident, the principal issue at hand is whether, under the Louisiana Products Liability Act, the claimed unreasonably dangerous product was being used (handled) in a manner that the manufacturer, at the time of manufacture, should reasonably expect (reasonably anticipated use). The Hunters appeal the apportionment by the district court of damages against defendant Knoll Rig & Equipment Manufacturing Co., Ltd. (KREMCO); it cross-appeals, ~~cont~~ending that, *inter alia*, the product (drilling rig racking board) was not being handled in a reasonably anticipated manner at the time of the accident. Because we conclude that, based on this issue, KREMCO was entitled to judgment as a matter of law, we REVERSE and RENDER.

I.

In 1981, KREMCO, a Canadian drilling rig manufacturer, sold one of its rigs to R. L. Long Co.; one component was the racking board in issue. Long modified the rig and racking board to suit customer preferences. Long sold the modified rig, with the racking board, to Hunter's employer, Mosley Well Service, in 1984. Claude Kenneth Hunter was crushed fatally by falling pipes while he worked in August 1990 as a derrickman for Mosley on a drilling operation. Hunter was positioned on the racking board, which was attached, approximately 50 feet above the ground, to the mast of the drilling rig. The mast, often referred to as a "derrick", was raised to a near-vertical position at the drilling site.

The frame of the racking board in issue was rectangular, with one of the shorter sides being partly open; that

open end was closest to the derrick. Handrails enclosed the two long sides and the other short side. As hereinafter described, the top ends of drilling pipes are brought into the racking board through the open end. Inside the frame of the racking board is a platform, or "diving board", on which the derrickman stands; it is attached to the middle of the back frame of the racking board and runs parallel to its long sides. On an end-racked racking board, such as the one involved here, there are fingers on each side of, and parallel to, the diving board; they point toward the mast. On the racking board, there were five fingers to the left of the diving board and seven to the right, between which the drilling pipes were to be racked (inserted). As manufactured, the racking board did not have chains or other restraining devices to assist in preventing the pipes from falling across the mast if they began to lean too much in that direction.

The back and side handrails of the KREMCO racking board were modified by another entity subsequent to sale by KREMCO. When the original KREMCO back handrail was raised to the upright position, it jutted up against the side handrails. The back handrail was secured to the side handrails with heavy-duty pins inserted through the "ears" at an angle vertical to the ground. This design was modified by removing the ears and attaching a latch on each end to secure the back handrail. It was these latches that failed, allowing the handrail to come forward and the pipes tied to it to fall across the mast, crushing Hunter.

A derrickman racks stands of pipe, which are about 55-60 feet in length, as they are removed from the drilling hole. When workers on the ground remove the pipe, the derrickman maneuvers the top of the pipe between the rack-

ing board fingers, and leans it against the bottom back frame of the racking board. A crew member on the ground positions the bottom end of the pipe at ground level. The pipe is leaned away from the mast in a "positive lean", as is the industry standard, and should be supported by the back frame of the racking board. Leaning the pipe toward the mast, in a "negative lean", is dangerous, because the pipe could fall toward the mast.

On an end-racked racking board, one pipe after another is racked in a row from the back to the front of the racking board. As stated, the derrickman and workers on the ground must ensure that the pipes maintain a positive lean (away from the derrick and toward the back of the racking board). At the time of the accident, Hunter had racked approximately 143 stands of pipe, weighing approximately 110,000 pounds. Due to the large number of pipes that had to be racked, the rig workers were concerned that all of the pipes would not fit into the racking board; accordingly, in an effort to fit more pipes, they did not give them much positive lean. In fact, the pipes were given only about three to four inches of positive lean, whereas normally the lean should be approximately 12 to 20 inches from the vertical, which is somewhere in the neighborhood of one to two degrees.

In racking the pipes, Hunter tied the first pipe in each row to the back handrail of the racking board with a sashcord, and then tied each successive pipe in each row to the previous pipe. As noted, when Hunter began racking the pipes, they were leaned away from the mast (positive lean). However, because the pipes being racked were larger at the top than at the bottom, and because the initial positive lean was not great enough, the pipes leaned less and less toward the back

of the racking board as more and more pipes were racked, until the pipes were vertical and then leaning toward the mast.

In industry terms, "the pipes grew"; when this occurs, the workers on the gound should "kick out" the bottom ends of the pipes, so that they do not lean toward the mast (negative lean). Due to his vantage point, the derrickman (Hunter) is the first person who would detect a negative lean; it is his responsibility to notify the workers on the ground that the bottoms of the pipes need to be moved ("kicked out").

Because the pipes were tied to the back handrail,[1] when the pull from the negative lean of the pipes became too great, the latches failed, allowing the back handrail and pipes to fall toward the mast. In the accident, no part of the racking board manufactured by KREMCO failed. Only the latches failed; but, as noted, they had been installed by an entity other than KREMCO.

After this action was filed against KREMCO in 1991 in Louisiana state court under the Louisiana Products Liability Act, LA. REV. STAT. ANN. § 9:2800.51, *et seq.* (LPLA), KREMCO removed it to district court based on diversity jurisdiction. The parties consented to trial before a magistrate judge; and, following five days of testimony, the jury returned a verdict for the Hunters. It found: (1) the racking board was unreasonably dangerous when it left KREMCO's control;

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[1] According to testimony, tying pipes to the back handrail is a misuse of the racking board, because that rail is designed only to support the weight of the derrickman should he fall. In fact, the derrickman's safety wire is attached to that handrail. According to the testimony, however, pipes are often tied to the back handrail.

(2) Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use; (3) Hunter's death was caused also by his negligence; (4) the latches were unreasonably dangerous; (5) Hunter's death was caused also by an unreasonably dangerous characteristic of the latches; (6) *Long caused the latches to be unreasonably dangerous*; (7) Mosley Well Service did not cause any unreasonbly dangerous characteristic of the latches; and (8) Hunter's death was caused also by the negligence of Mosley Well Service employees. The jury assessed fault as follows: KREMCO 30%, Hunter 5%, Long 30%, and Mosley 35%.[2]

Post-verdict, the district court found that Long is insolvent and that the Hunters had not received any compensation from Long. Of the stipulated damages of approximately $1.3 million, the court assessed approximately $652,000 against KREMCO. As it had at the close of the Hunters'

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[2] The dissent implies, incorrectly, that this opinion is based on the proposition that the comparative fault of other parties insulated KREMCO from its own fault. While some pre-LPLA cases have been criticized for going so far under the pre-LPLA standard of "normal use" as to treat product misuse as a defense the manufacturer had to prove, rather than something the plaintiff had to prove did not occur (*see e.g. Bell v. Jet Wheel Blast*, 462 So.2d 166, 172 (La. 1985)), the new LPLA standard of "reasonably anticipated use" is narrower in scope and does not include reasonably foreseeable misuse, as discussed *infra*. *Daigle v. Audi of America, Inc.*, 598 So.2d 1304, 1307 (La. App. 3d Cir. 1992); *Lockart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864, 867 (5th Cir. 1993); John Kennedy, A Primer on the Louisiana Products Liability Act, 49 LA. L. Rev. 565, 584-86 (1989) (explaining that the LPLA standard of "reasonably anticipated use" is more narrow than the prior "normal use" standard and, *inter alia*, does not include product misuse) (Kennedy was a co-drafter of the LPLA.). We recognize that there may well be inherent conflicts between liability under the LPLA and comparative fault. The parties do not raise this issue, however, and we do not reach it.

case and of all the evidence, KREMCO moved for a judgment as a matter of law on, *inter alia*, whether the accident occurred, as required by LPLA, during a "reasonably anticipated use" of the racking board. The motion was denied.

II.

For this diversity action, the parties do not dispute that Louisiana law controls. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). The threshold issue is whether the manner in which the racking board was used when the accident occurred was "reasonably anticipated" by KREMCO at the time of manufacture.[3]

The LPLA provides that

> [t]he manufactureer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

LA. REV. STAT. ANN. § 9:2800.54 (A). Of critical importance here, "reasonably anticipated use" is defined as "a use or *handling* of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." LA. REV. STAT. ANN. § 9:2800.53 (7)

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[3] Because we conclude that the manner in which the pipes were racked was not a "reasonably anticipated use", we need not reach the other issues presented, including whether the design of the racking board was unreasonably dangerous, whether KREMCO breached an express warranty, and whether liability and damages were apportioned properly.

(emphasis added). Accordingly, KREMCO can be liable only if the particular use (negative lean) of the racking board was "reasonably anticipated" by it; and, if it was not, we do not reach whether the racking board was unreasonably dangerous because, for example, it did not have a chain, or chains, across the open end. *Lockart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864, 867 (5th Cir. 1993).

In *Lockart,* a products liability action was filed against the manufacturer of an excavator. Two workers had suspended a pontoon by looping a chain around the teeth of the excavator's bucket and the pontoon fell, killing one worker and injuring the other. Our court upheld summary judgment, because using the excavator to suspend the pontoon was not "reasonably anticipated" within the meaning of the LPLA. The court rejected the idea that a warning in the operator's manual not to hang objects from the bucket was evidence that the manufacturer had reasonably anticipated that the excavator would be used in that manner.

The fact that there were warnings on the product in *Lockart* does not distinguish it from the Hunters' case:

> Even if the warning did not reach the users, the LPLA speaks of "an ordinary person in [the] same or similar circumstances". These users had many years experience mining and working with heavy machinery, and both had taken company courses in equipment handling in 1986. The dangers of using the bucket to suspend a heavy pontoon should have been obvious to the ordinary consumer and certainly to experienced workers.

Lockart, 989 F.2d at 868 (footnote omitted).[4] This was consistent with the dictates of the LPLA:

> A manufacturer is not required to provide an adequate warning about his product when: ... The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

LA. REV. STAT. ANN. § 9:2800.57 (B); *see e.g., Morgan v. Gaylord Container Corp.*, 30 F.3d 586, 591 (5th Cir. 1994).

In noting that the LPLA standard for reasonably anticipated use (defined in the previously quoted § 9:2800.53 (7)) is more stringent than the pre-LPLA standard, *Lockart*, 989 F.2d at 867, cited *Daigle v. Audi of America, Inc.*, 598 So.2d 1304, 1307 (La. App. 3d Cir. 1992), which recognized that "[t]his definition is narrower in scope than its pre-LPLA counterpart, 'normal use', which included all reasonably foreseeable uses and misuses of the product." As stated in *Lockart* "[t]his more restrictive scope of liability was to avoid prior confusion and because virtually any conceivable use is foreseeable". 989 F.2d at 867.

To illustrate the meaning of "reasonably anticipated use", *Daigle* gives the following examples of what uses a manufacturer should not reasonabaly expect of an ordinary person:

> "Reasonably anticipated use" ... convey[s] the

[4] In an attempt to distinguish *Lockart*, the dissent appears, erroneously, to rely in part on the warning.

> important message that the manufacturer is not responsible for accounting for every conceivable foreseeable use. It is foreseeable that a consumer might use a soft drink bottle for a hammer, might attempt to drive his automobile across water or might pour perfume on a candle to scent it. If he does, however, the manufacturer of the product should not be and under the LPLA is not liable because the uses in the illustrations are not the sort that a manufacturer should reasonably expect of an ordinary consumer.

598 So.2d at 1307 (quoting John Kennedy. *A Primer on the Louisiana Products Liability Act,* 49 LA. L. REV. 565, 586 (1989)) (Kennedy was a co-drafter of the LPLA.). Similarly, in *Myers v. American Seating Co.,* 637 So.2d 771 (La. App. 1 Cir. 1994), the plaintiff was injured when a folding chair jackknifed while she was standing on the rear portion of it. The court denied manufacturer liability:

> Although this use may be a conceivable use, it is not a reasonably anticipated use. Most people who use a folding chair as a stepladder utilize the front portion of the seat upon which to stand. . . . . [A]ny danger presented by standing on a folding chair is an obvious danger to a reasonable person.

Myers, 637 So.2d at 779.

Another example is *London v. MAC Corp. of America,* 44 F.3d 316 (5th Cir. 1995), in which a worker fell while standing on the gearbox cover to reach material in a shredder. Pursuant to the LPLA, our court affirmed judgment as a

matter of law at the close of the case for the manufacturer because, "although the use of the gearbox cover as a work station may be conceivable, [the manufacturer] could not reasonably anticipate its use in this fashion". 44 F.3d at 319. Finally, *Delphen v. Dep't of Transp. & Dev.*, 657 So.2d 328 (La. App. 4th Cir. 1995) concerned, *inter alia*, a bicycle manufacturer sued under the LPLA when a quick release allowed the front wheel to separate from the bicycle. In reversing a jury verdict against the manufacturer, the court held:

> Danger imposed by the wheel would have been obvious to a reasonable person who would recognize that the bicycle was a specialized product for sophisticated users, and the ordinary person should inquire into the proper manner of fastening the quick release mechanism before using the bicycle again. Considering the obvious danger posed by the sophisticated bicycle, the fact that [the plaintiff] rode the bicycle across [a] drawbridge without obtaining additional instructions regarding the bicycle's proper use and knowing that the wheel previously had become loose, was not a reasonably anticipated use of the product.

Delphen, 657 So.2d at 333-34.

Likewise, while it is conceivably foreseeable that rig workers might lean pipes toward the mast so they may fall, at issue is whether, under § 9:2800.53 (7), this is the type use that a manufacturer of a racking board "should reasonably expect of an ordinary person in the same or similar circumstances". Restated, the Hunters had the burden of proving that, at the time of manufacture, KREMCO "should [have] reasonably expect[ed] ... [that] an ordinary

user of the racking board would lean the pipes toward the mast as was done the night of the accident. *Lockart*, 989 F.2d at 869.

The well-known standard for judgment as a matter of law is found in FED. R. CIV. P. 50, as defined more fully by *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). *See United States Fire Ins. Co. v. Confederate Air Force*, 16 F.3d 88, 91 (5th Cir. 1994). Rule 50 (a) (1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue.

And, *Boeing*, 411 F.2d at 37, states:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the [motion] is proper. On the other hand, if there is substantial evidence opposed to the [motion], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the [motion] should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

As stated, at issue is whether the manner in which the pipes were leaned was, to KREMCO at the time of manufacture, a reasonably anticipated ("should [have been] reasonably expect [ed]") use by "an ordinary person in the same or similar circumstances". LA. REV. STAT. ANN. §§9:2800.54 (A), .53 (7). Based on our review of the record, we conclude that this particular use was not reasonably anticipated.

At the time of manufacture, KREMCO was aware of the possibility of negative lean and the attendant risk.[5] Likewise, Danny Ray (rig operator), Charles Berry (rig operator), and Kenneth Willoughby (derrickhand), testified that there were times when 3 1/2 inch pipe (used at the time of the accident) starts to lean toward the masts if a large number of that type are placed in the racking board. In addition, both Tommy Prince (floorhand and derrickman) and Ray testified that they had seen this type pipe racked with a sashcord tied to the rear handrail to secure the pipe.

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[5] Gerald Knoll, the founder of KREMCO, knew at the time the racking board was manufactured that, if pipes were not racked with enough positive lean, they would fall toward the mast. However, Knoll testified that if you start with a proper positive lean, you will "never ... have [the] problem" of pipes growing enough at the top to produce a negative lean; and that "we felt that we were selling to knowledgeable users and that [it] would be the responsibility of the end user to come up with the procedure" for racking the pipe. According to Knoll, KREMCO didn't make any assumptions when it built the racking boards as to how the end user would use them. He testified that he does not think that the manufacturer had a duty to advise the public as to the proper way to use the equipment; that, at the time, KREMCO did not have any information or knowledge about how pipe would be secured in the derrick; and that, although a Canadian regulation instructed that tubes should be secured at the top by means of tie-back ropes or an equivalent device to prevent them from falling out of, or across, the derrick, that statement was directed toward the operator or employer, not the manufacturer.

But while it may be common for this type pipe to have a tendency to grow at the top (lean toward the mast), these witnesses testified that the common practice is that, once the pipes do start to lean, the negative lean is corrected. Their testimony indicates that it is not reasonable, but instead is dangerous and against industry practice, to allow a negative lean to subsist.[6]

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[6] Ray testified that "[j]ust about any time you trip pipe ... it mushrooms at the top. Kind of flares out. Gets bigger." The dissent erroneously draws the conclusion from Ray's testimony that a negative lean is common. Although Ray testified that he had seen pipes racked as depicted in a diagram presented by the Hunters' counsel, Ray could not tell how much those pipes were leaning. Ray testified that if a negative lean occurs, you then "space out the bottom some and it will throw some lean back in once the pipe starts getting too much on you"; that if the lean gets too much toward the mast "that's when you would start your next row"; that you don't want the pipes to lean toward the mast because you don't want them to fall into it; that "you always want the pipe to go to the back". It is unreasonable to conclude from Ray's testimony that a negative lean is commonplace. Ray testified that a negative lean is something you would be worried about and that it is the job of the derrickman to notify people on the ground if there is a problem with the pipes leaning toward the mast.

Berry testified that the normal practice for Mosley and other companies in the industry is to lean the pipes away from the mast, and that this is the safe practice so the pipes will stay in the racking fingers. The dissent states that Berry confirmed that pipes are always tied to the handrails. While Berry testified that he tied pipes to the side or back handrail every time, he neither testified that pipes were always tied to the back handrail, nor that tying negatively leaning pipes to the back handrail was a common or safe practice. And, contrary to the dissent, Berry never described a negative lean as commonplace. He testified that the idea is to have the pipes lean away from the mast, and that you try to lean the pipes away from the mast enough so that when all the pipes are racked, they will still be leaning toward the back of the racking board; that, if you lean pipes toward the mast, you encounter problems. Though Berry testified that there are times when the weight of the pipes gets too much toward the mast, he testified that, if there was trouble with the pipes leaning toward the mast, he would kick the pipes out at the bottom to prevent a negative lean. Berry confirmed that it would concern him if the pipes started leaning toward the mast, because it is not safe. He testified that

Contrary to the Hunters' assertion, the evidence does not allow a reasonable juror to find that leaning the pipes toward the mast was a common occurrence. Kenneth Kaigler, who had worked in the field for over 40 years, testified for the Hunters as an expert in the field of rig operations and safety. When asked if he had "ever seen pipe with a negative lean ... in the racking board", he replied: "... [M]aybe a half a dozen times, not very often. It's not a common deal, but I have seen it." In short, a reasonable juror could not conclude from Kaigler's testimony that a negative lean was a

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footnote 6 continued

it was Hunter's responsibility as derrickman to notify people on the ground of a negative lean so they could kick out the pipes.

Willoughby testified that, according to Mosley's practice, and the practice in the industry, you do not lean pipes toward the mast during the racking process. He testified that anybody with years of experience in the oilfield would know that it is not a safe practice to let pipes lean toward the mast and tie them that way. Willoughby testified that even when pipes are racked all the way to the end of the finger, the pipes should still be leaning away from the mast. He confirmed that the derrickman should notify the people on the ground if the pipes are leaning toward the mast, so the ground crew can either remedy the problem or stop racking. According to Willoughby, the derrickman is the first one to know there is a problem with the lean of the pipes, and he ought to do something to take care of it. Willoughby verified that the only two times when Mosley Well Service has had a pipe swarming incident (the accident in issue and an earlier occasion) is when the pipes were leaning toward the mast.

Although Prince testified that he had seen pipes secured with sashcord on a number of occasions, he did not testify that it was common to lean pipes toward the mast. Prince asserted that Smith (the toolpusher) and Berry (the rig operator) were worried about the lean of the pipes on the night of the accident. He admitted that it is the responsibility of the derrickman to notify the people on the ground if there is a problem with the lean.

common occurrence.[7]

Testimony, in fact, indicates that the lean at the time of the accident was obviously dangerous.[8] Eric Beavers, who was the floorhand on the rig when the accident occurred and was handling the bottom of the pipes, testified that the toolpusher was "raising hell" because the lean of the pipes "was ridiculous".[9] Beavers testified that the toolpusher "ought to have been griping" because the pipes were leaning to the degree that it was dangerous.

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[7] The dissent concedes that Kaigler, the Hunters' own expert witness, testified that negatively leaning pipe was "not common". In determining whether the manufacturer at the time of manufacture should have reasonably expected the dangerous negative lean, Kaigler's expert testimony is of far greater importance than that of the rig workers (who, as the dissent admits, negligently failed to correct the negative lean). Even assuming that Ray and Berry thought that leaning pipes negatively was common, the outcome of the case is no different, because, obviously, "reasonably anticipated use", as applied to KREMCO, is an objective standard. *Daigle*, 598 So.2d at 1307; *Lockart*, 989 F.2d at 867. In other words, what Ray and Berry thought is of little, if any, import; the question is whether, at the time of manufacture, KREMCO reasonably anticipated (objective standard) that the pipes would be leaned toward the mast in a dangerous manner. Restated, the testimony by Ray and Berry is not a basis for determining whether the objective standard is satisfied. No reasonable juror could have found under an objective standard that KREMCO reasonably anticipated when it manufactured the racking board that pipes would be racked with the dangerous negative lean present in this case.

[8] Contrary to the dissent's assertion, we do not seize upon the existence of a mere negative lean. While this type of pipe may have a tendency to lean toward the mast, it was not reasonably anticipated that pipes would be racked with an obviously dangerous negative lean.

[9] Beavers died before trial. Counsel attempted to clarify whether Beavers' deposition testimony was that the lean was "ridiculous" or "dangerous", but the clarification only creates more confusion. This distinction is immaterial; for our purposes, both words convey the same meaning.

The danger of allowing the pipes to lean toward the mast so that they might fall should have been obvious to the ordinary user of racking boards. (This was certainly obvious to the experienced workers at Mosley Well Service. See *Lockart*, 989 F.2d at 868. As shown by their testimony, the Mosley employees knew that it was dangerous, and certainly not the industry practice, to allow the pipes to have negative lean. Furthermore, as noted, Mosley had had a swarming incident prior to the accident in issue. *See Delphen*, 657 So.2d at 333-34.) In light of the unreasonable lean toward the mast, the manner in which the racking board was used was not a reasonably anticipated use.[10]

In sum, the LPLA imposes manufacturer liability only if the accident occurred during a reasonably *anticipated* (manufacturer should have reasonably expected) use, not a reasonably foreseeable use or misuse. *Daigle*, 598 So.2d at 1307; *Lockart*, 989 F.2d at 867 (citing *Daigle*). There is no evidence that it was reasonably anticipated that the pipes would be racked with such a dangerous lean toward the mast.[11] A reasonable juror could not have arrived at a con-

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[10] Expert witness Howard Elwell, Jr., testified that a design by a different manufacturer that incorporated chains in the design "provided insight into the manufacturer's knowledge about pipe-swarming problems and how to control them". But, a reasonable juror could not conclude that the existence of such designs shows that it was reasonably anticipated that pipes would be racked with a negative lean.

[11] Despite the dissent's concern that we do, we do not lose sight of the fact that the standard for reviewing a jury verdict under *Boeing* and subsequent cases is very high; but, on the other hand, we are compelled under *Boeing* to reverse the jury when no reasonable juror could have found that, at the time of manufacture, KREMCO reasonably anticipated the dangerous use to which the racking board was put. It is true, as the dissent states, that the jury could have found the testimony of Ray and Berry

trary conclusion. Therefore, judgment as a matter of law for KREMCO was compelled.

III.

For the foregoing reasons, the judgment is REVERSED and judgment is RENDERED in favor of Knoll Rig & Equipment Manufacturing Co., Ltd.

REVERSED and RENDERED

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footnote 11 continued

credible; however, this is irrelevant because, as noted, nothing in their testimony supports that racking the pipe with the dangerous negative lean present in this case is common or was a reasonably anticipated use of the racking board.

BENAVIDES, Circuit Judge, dissenting:

The majority reviews the evience and concludes that the manner in which the racking board was used was not a "reasonable anticipated use." But because there is evidence from which a reasonable jury could conclude otherwise, I am compelled to dissent.

In reviewing a jury verdict, our standard is clear: we must view all of the evidence in favor of the prevailing party. Weighing the conflicting evidence and the inferences to be drawn from it is the province of the jury; its decision must be accepted if the record contains any competent and substantial evidence tending to support the verdict. *Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1326 (5th Cir. 1995); *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1178, (5th Cir. 1992). "If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial contradictory evidence that could have supported an opposite verdict." *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989), *accord Knowlton*, 957 F.2d at 1178. I believe the majority loses sight of this standard.

The majority opinion accurately reflects the events surrounding this drilling rig accident. While acting as derrickman, Hunter was maneuvering pipe into a racking board. The floorhands positioned the pipe at ground level. It is undisputed that the pipes were initially given positive lean, albeit less than desirable. Hunter tied the pipe to the back handrail of the racking board with sashcord which, as the majority notes, is common. As each successive pipe was tied

to the previous one, the pipes grew at the top creating a negative lean. The latches on the back handrail failed; the pipes crashed forward; Hunter was killed.

In absolving KREMCO of liability, the majority seizes upon the existence of negative lean and uses it to craft an exclusion from "reasonably anticipated use." In doing so, it usurps the function of the jury and Hunter's right to the jury's decision. In its answer to jury question two, the jury found that Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use. Given our standard of review, we must uphold this verdict if there exists evidence in the record to support that conclusion, even if there is substantial evidence to the contrary. In this case, there is evidence that both negative lean itself is common and the overall use of the racking board was routine.

At trial, rig operator Danny Ray testified that pipe is always tied to the back handrail. Ray examined a diagram showing negative leaning pipe and testified as follows:

> Q: In looking at this diagram, Mr. Ray, in looking at the way this pipe is racked, is this something that is common to you or at least seen by you out there in your work as an oil well service operator?
>
> A: Yes, sir. Just about any time you trip pipe it always—it's tight at the bottom, but as you (sic) collars butt up against one another you're coming out of it, it mushrooms at the top. Kind of flares

out. Gets bigger.[1]

On cross examination, in direct response to whether it is common practice to lean pipe toward the mast, Ray testified: "You have to kind of do it the way you—to get the job done, you know? Not all wells are perfect and you just kind of gotta do the job the best you can. If you're tripping 12 or 14 thousand foot of pipe and you can space out the bottom some and it will throw some lean back in it once the pipe starts getting too much on you." Further, on redirect Ray was asked: "You have racked pipe with it leaning towards the mast before, haven't you?" Ray responded, "yes, sir, I have."[2]

In addition to Ray's testimony, rig operator Charles Berry testified that when they started tripping the pipe the workers used three to four inches of positive lean. He confirmed that pipe is always tied to the handrails.[3] He also

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[1] The majority argues that because Ray could not quantify the degree of negative lean in the diagram that no reasonable jury could credit this testimony. The majority does not, however, deny that the diagram does illustrate negative leaning pipe and that the diagram, Plaintiff's Exhibit 29.16, was introduced into evidence and was before the jury.

[2] The majority claims that it is unreasonable to conclude from Ray's testimony that negative lean was common. Obviously, the majority is unpersuaded and readily discounts Ray's testimony. I quote from the testimony directly to support my view that a reasonble jury could conclude otherwise.

[3] On cross-examination, Berry was asked: "It's true, isn't it, Mr. Berry, that that handrail isn't meant to take the weight of all that pipe, is it; isn't that true?" Berry replied: "I'm going to put it like this if I may, I have tied pipe to handrails every time I have ever worked derricks on a drilling rig or a workover whether it's from the side handrail or the back handrail." In addition to Ray's testimony that pipe was always tied to the back handrail and Berry's testimony that he always tied to a handrail, derrickman Kenneth Willoughby was asked, "How have you

examined the same exhibit showing negative leaning pipe that Ray described as commonplace and testified that the pipe looked the same way on the day of the accident.[4]

Unquestionably, there is conflicting evidence. Hunter's own expert, Kenneth Kaigler, testified that while he had seen negative leaning pipe it was not common. Likewise there is ample testimony that negative lean could be corrected by "kicking out" the pipe at the bottom. Nonetheless, there remains the testimony of Ray and Berry that a jury could find credible and conclude that the racking board was being used in a manner that was common.[5]

Moreover, the majority's focus on the "tree" of negative lean obscures the "forest" of reasonably anticipated use. The evidence at trial reflects that the pipe was initially being

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footnote 3 continued

secured pipe in the racking board in you 18 years of experience when there wasn't a chain up there to secure it in the racking board?" Willoughby responded: "Tie it off with sash cord or some kind of rope to your back handrail." The majority likewise concedes that "[a]ccording to the testimony, however, pipes are often tied to the back handrail." Maj. op. at 5 n.1.

[4] Berry was asked: "I will refer you to Plaintiff's Exhibit 29.16. Mr. Berry, would you say that the pipe looked about as shown in this illustration that we have marked as Plaintiff's Exhibit 29.16?" He answered: "From my point of angle, yes, sir, that would be just about it right there." The majority erroneously claims that I characterize *Berry* as stating that negative lean was common. It was *Ray* who testified that the diagram showing negative lean was common. Berry merely confirms that the diagram reflected the lean of the pipe on the day of the accident.

[5] The majority claims that in determining whether the manufacturer should have reasonably expected negative lean, Kaigler's testimony "is of far greater importance than that of the rig workers." Maj. op. at 15 n.7. This is precisely the type of interference with the *jury's* province that we should eschew. Despite the majority's unwillingness to find the workers' testimony credible, the jury could. This is especially true given the fact that the founder of KREMCO testified that they did not make *any* assumptions as to how the customer would use the racking board. Maj. op. at 13 n.5.

racked with positive lean. It was secured to the back handrail as was common. As the pipe was being racked, it grew larger as expected. As a result, there was negative lean. At this point, the workers negligently failed to correct the lean. This failure, however, does not lead to the conclusion that the overall use of the board was not a reasonably anticipated one. Rather, the workers' failure to correct the lean speaks to their comparative fault. The jury clearly understood this and found both Hunter and his co-workers partially at fault.[6] The workers' negligence should not, however, insulate KREMCO from its own fault. Viewing the entire context of the use of the racking board prior to the accident, a reasonable jury could conclude that it was being used in a manner that was reasonably anticipated by the manufacturer.

Consequently, I am unpersuaded by the analogy the majority draws with other examples where a manufacturer would not be liable under Louisiana law. At issue here is not a foreseeable, yet bizarre, use of a product such as using a soda bottle as a hammer or driving a car across water. Maj. op. at 9-10. Rather, the evidence reflects that the racking board was being used for its intended purpose (to rack pipe) and in a manner that a jury could conclude was common.

The majority's reliance on *Lockart v. Kobe Steel Ltd. Constr. Mach. Div.*, 989 F.2d 864 (5th Cir. 1993), is also unpersuasive because of its procedural posture. In *Lockart*, two workers lifted a steel pontoon by chaining it to the teeth of the bucket scoop of an excavator. The workers then worked underneath the suspended pontoon. The chain slipped from the teeth dropping the pontoon on the workers. While we

[6] The jury found that Hunter's death was caused by his own negligence and assessed 5% fault to him. It found that his death was also caused by the negligence of employees of Mosley Well Service and apportioned their fault, 35%, against Mosley Well Service.

found that using an excavator to suspend a pontoon was not a reasonably anticipated use, we did so after conducting our own independent review of the evidence as is our standard for summary judgment review. We held that "in this instance in which the manufacturer provided a clear warning, the product was handled by experienced users, and no hard evidence was offered to rebut these facts, we must affirm the judgment of the district court." *Lockart* 989 F.2d at 869. Unlike *Lockart*, in this controversy we review a jury's verdict and must give deference to that verdict if there is support in the record. This is true even if there is substantial contradictory evidence that could support the opposite. We are not free to review the evidence *de novo* and draw our own conclusion on reasonably anticipated use.

Viewing the record in the light most favorable to the verdict, I would conclude that there is some evidence that the jury could credit that negative lean itself is common. Moreover, properly viewed in context, the overall use of the racking board was also routine. The jury found that Hunter's death occurred during this reasonably anticipated use of the racking board. I would stay out of the jury box and affirm.[7]

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[7]Because of the majority's resolution of the anticipated use issue, it did not reach whether the racking board was unreasonably dangerous. Having reviewed the record, I would conclude that there is ample evidence to support the jury's verdict on this issue as well. In an effort not to unnecessarily lengthen this dissent, I would note that there was expert testimony of alternative designs and safety mechanisms, existing at the time of manufacture of the racking board at issue, which would have prevented Hunter's death. This evidence not only supports the jury's conclusion on an unreasonably dangerous product but provides additional evidence from which a reasonable jury could conclude that the manufacturer should have anticipated negative lean; it appears that other manufacturers did.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
JUL 22 1994

ORDER

For the reasons stated in the foregoing Memorandum Ruling,

IT IS ORDERED that Motion for Judgment as a Matter of Law filed by defendant, Knoll Rig & Equipment Manufacturing Co., Ltd. a subsidiary of the Draco Group of Companies, Ltd., is DENIED.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 22d day of July, 1994.

s/s Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
JUL 22 1994

MEMORANDUM RULING

Defendant, Knoll Rig & Equipment Manufacturing Co., Ltd., a subsidiary of the Draco Group of Companies, Ltd., (hereinafter "KREMCO"), has filed a Motion for Judgment as a Matter of Law contending that the jury's finding that the accident at issue occurred during a reasonably anticipated use of KREMCO's product is manifestly erroneous as a matter of fact and law. Defendant asserts that testimony at trial revealed that leaning the pipe against the mast was not a reasonably anticipated use of the KREMCO monkey board. Additionally, defendants argue that evidence revealed that no part of the rig manufactured by KREMCO experienced

a physical failure which resulted in Mr. Hunter's death. In support of the first contention, defendant relies on *Lockart v. Kobe Steel,* 989 F.2d 864 (5th Cir. 1993). Although *Lockart* correctly points out that the definition of a reasonably anticipated use is narrower in scope than its pre-Louisiana Products Liability Act counterpart, *Lockart* must be distinguished. The court in *Lockart* held that the use of the product was not reasonably anticipated because the manufacturer had clearly warned against the particular use of the product engaged in by plaintiff. Since there have been no allegations made, nor any evidence presented at trial that there ever were any warnings by KREMCO with regard to the use of the racking board, the holding of *Lockart* does not apply.

With regard to defendant's contention that testimony of the Mosley employees revealed that the use was not reasonably anticipated, there was testimony, that the jury might have credited, to the effect that tying the pipe with sash cord and causing it to lean against the mast happened with some frequency. Reasonably anticipated use as defined in La.R.S. 9:2800.53 (7) is "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances". While the standard for reasonably anticipated use is narrower since the adoption of the Louisiana Products Liability Act, the court must consider all of the evidence — not just that evidence which supports the movant's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. *Johnstone v. American Oil Co.,* 7 F.3d 1217 (5th Cir. 1993); *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969). Although defendant cites testimony that leaning the pipe toward the mast was improper and unsafe, plaintiff cites testimony that it was a common occurrence. On a

motion for directed verdict, the court must ascertain whether the evidence is such, without weighing the credibility of witnesses *or* considering the weight of the evidence, and that there is substantial evidence from which the jury could find in favor of the party against whom the motion is made. The fact that the court, sitting alone, might have weighed the evidence differently does not matter. *Lewis v. City of Irvine,* 899 F.2d 451 (6th Cir. 1990). Further, a directed verdict should only be granted if the evidence is such that without weighing the credibility of witnesses there can be but one reasonable conclusion. *Hurnon v. Revere Copper & Brass, Inc.,* 494 F.2d 705, 8th Cir. 1974, *cert. denied,* 95 S.Ct. 124, 419 U.S. 867, 42 L.Ed.2d 105 (1974). Further, a directed verdict is inappropriate if there is conflicting evidence. *Bond v. Morton Buildings, Inc.,* 815 F.Supp. 944, (S.D.W. Va. 1993); *Forro Precision, Inc. v. International Business Machines Corporation,* 673 F.2d 1045 (9th Cir. 1982). Because defendant relies on conflicting testimony, judgment as a matter of law is inappropriate.

Additionally, defendant argues that the evidence revealed that there was no physical failure of the part of the rig manufactured by KREMCO. However, under La.R.S. 9:2800.56, plaintiff presented evidence that had KREMCO installed chains on the racking board, it would have prevented the pipe from swarming. It is reasonable to conclude that the jury determined that had KREMCO installed chains on the racking board, the accident would not have occurred. Due to the fact that defendant's contentions are supported by contradictory testimony that necessitated credibility findings by the jury, this court is unable to grant defendant's motion for judgment as a matter of law.

Accordingly, defendant's Motion for Judgment as a Matter of Law is **DENIED.** An Order consistent with this ruling is attached.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 22d day of July, 1994.

/s/ Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
JUL 20 1994

AMENDED JUDGMENT

In accordance with the foregoing Memorandum Ruling, the Judgment rendered on May 13, 1994 is hereby **AMENDED** to read as follows:

IT IS ORDERED AND ADJUDGED that there be judgment in favor of plaintiffs, Ilene Thurman Hunter, Melissa Ilene Hunter, Michael Christopher Hunter, Claude Kenneth Hunter, Jr., Kathy Michelle Hunter and Donnovan Blaine Hunter, and against Knoll Rig & Equipment Manufacturing Co., Ltd., a subsidiary of Draco Group of Companies, Ltd. and National Union Fire Insurance Co. of Pittsburgh, PA in the amount of Six Hundred Fifty-two Thousand,

Ninety-Three and 50/100 Dollars ($652,093.50), together with interest from date of judicial demand and all costs of this proceeding.

IT IS FURTHER ORDERED AND ADJUDGED that the intervention of Fidelity & Casualty Company of New York be recognized in accordance with the Stipulation filed on May 2, 1994, and that Intervenors be entitled to payment by preference and priority in the amount of Fifty-Seven Thousand, One Hundred Fifty-Nine and 60/100 Dollars ($57,159.60) from the Judgment rendered above in favor of Ilene Thurman Hunter, et al., together with the interest attributable to such amount from date of judicial demand. Costs of the intervention are awarded against Knoll Rig & Equipment Manufacturing Co., Ltd.

IT IS FINALLY ORDERED AND ADJUDGED that the credit due to Intervenors against future worker's compensation obligations shall be in accordance with the Stipulation filed into the record on May 2, 1994 which is recognized and incorporated herein by reference.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 19th day of July, 1994, *nunc pro tunc* to May 13, 1994.

/s/ Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
MAY 13 1994

J U D G M E N T

This matter having come on for jury trial on May 2-9, 1994, the Honorable Roy S. Payne, United States Magistrate Judge presiding, and a jury having returned its verdict in Open Court on May 9, 1994;

IT IS ORDERED AND ADJUDGED that there be judgment in favor of plaintiffs, Ilene Thurman Hunter, Melissa Ilene Hunter, Michael Christopher Hunter, Claude Kenneth Hunter, Jr., Kathy Michelle Hunter and Donnovan Blaine Hunter, and against Knoll Rig & Equipment Manufacturing Company in the amount of Six Hunderd Fifty-two Thousand, Ninety-three and 50/100 Dollars ($652,093.50), together

with interest from date of judicial demand and all costs of this proceeding.

IT IS FURTHER ORDERED AND ADJUDGED that the intervention of Fidelity & Casualty Company of New York be recognized in accordance with the Stipulation filed on May 2, 1994, and that Intervenors be entitled to payment by preference and priority in the amount of Fifty-Seven, Thousand, One Hundred Fifty-Nine and 60/100 Dollars ($57,159.60) from the Judgment rendered above in favor of Ilene Thurman Hunter, et al., together with the interest attributable to such amount from date of judicial demand. Costs of the intervention are awarded against Knoll Rig & Equipment Manufacturing Company.

IT IS FINALLY ORDERED AND ADJUDGED that the credit due to Intervenors against future worker's compensation obligations shall be in accordance with the Stipulation filed into the record on May 2, 1994 which is recognized and incorporated herein by reference.

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 13th day of May, 1992.

/s/ Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	REFERRED TO: MAGISTRATE JUDGE PAYNE

FILED
MAY 9 1994

JURY VERDICT FORM

1.

Do you find by a preponderance of the evidence that, at the time the racking board of the workover rig left KREMCO's control, it was unreasonably dangerous in design, or because of an inadequate warning or breach of an express warranty?

YES ✓ NO ___

(If your answer is YES, proceed to question 2.

If your answer is NO, have your foreman sign this form on the next page and do not answer questions 2-7.)

2.

Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use of that product?

YES ✓ NO ___

(If your answer is YES, go to question 3. If your answer is NO, have your foreman sign at the end of this form.)

3.

Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by his own negligence?

YES ✓ NO ___

4.

Do you find by a preponderance of the evidence that the latches of the racking board possessed an unreasonably dangerous characteristic?

YES ✓ NO ___

Do you find Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the latches?

YES ✓ NO ____

(If your answer is NO, skip questions 6 and 7 and go directly to question 8.)

6.

Do you find by a preponderance of the evidence that R. L. Long Company caused any unreasonably dangerous characteristic of the latches of the racking board?

YES ✓ NO ____

7.

Do you find by a preponderance of the evidence that Mosley Well Service caused any unreasonably dangerous characteristic of the latches of the racking board?

YES ____ NO ✓

8.

Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by the negligence of any employees of Mosley Well Service other than Mr. Hunter?

YES ✓ NO ____

If you answered NO to question 3, you must put a zero in the blank for Mr. Hunter. If you answered NO to either question 4, 5, or 6, you must put a zero in the blank for the R. L. Long Company. If you answered NO to either questions 4, 5, or 7, and NO to question 8, you must put a zero in the blank for Mosley Well Service. Express, in terms of a percentage, the degree of KREMCO's fault or negligence, and any fault or negligence you find attributable to any person or entity for whom you have not already entered a zero percentage. The total must equal 100 percent.

(a)	30 %	KREMCO
(b)	5 %	Mr. Hunter
(c)	30 %	R. L. Long Company
(d)	35 %	Mosley Well Service

(Please have your foreman sign and date this form on the lines below.)

5/9/94 /s/ Illegible

FOREMAN

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40822

FILED
MAR 28 1996

ILENE THURMAN HUNTER, obo Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter and Donnovan Blaine Hunter.

Plaintiffs-Appellants
Cross-Appellees,

versus

KNOLL RIG &
EQUIPMENT MANUFACTURING CO., LTD.,
A Subsidiary of Draco Group of Companies, Ltd,
Et Al.,

Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 29, 1995, 5 Cir., 70 F.3d 803)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED. Alternatively, we are asked most belatedly to certify this case to the Louisiana Supreme Court. We DENY that request as well. We are not persuaded that this opinion reflects any large policy choices. Rather, our holding is case specific, responding to unique factual circumstances. Specifically, we conclude only that the manufacturer could not expect the gross and unusual "handling" of its product that occurred. We do not insist that under Louisiana law a manufacturer can "expect" only uses of a product that are common. LA. REV. Stat. ANN. §§ 9:2800.54 (A) & .53 (7).

BENAVIDES, Circuit Judge, dissenting from denial of rehearing and en banc review:

The majority denies rehearing while at the same time abandoning the legal foundation previously advanced in its opinion. Given the language in the majority's denial of rehearing,[1] I take some solace that the aberrant holding in this case will not be used in the determination of other cases. Undoubtedly, this provides little comfort to Claude Hunter's family. I continue, however, to be baffled by the panel majority's characterization of the use of the racking board as "gross and unusual." Quite simply, the racking board was designed to rack pipe and was being used for exactly that purpose at the time of the accident. And there is evidence to support the jury finding that the manner in which the racking board was used by Hunter and the rig workers that contributed to the accident should have been reasonably anticipated by KREMCO. The workers' negligence should not preclude recovery, but is appropriately a consideration under Louisiana's comparative negligence regime. Hunter's death would have been prevented if KREMCO had incorporated the safety features into its product that other manufacturers did. The jury so found. I would grant the petition for rehearing and dissent from the Court's decision to deny en banc review of this appeal.

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1 "[O]ur holding is case specific, responding to unique factual circumstances
. . . . We do not insist that under Louisiana law a manufacturer can 'expect' only uses of a product that are common."

APPENDIX H

STATUTORY MATERIALS

1. United States Constitution, Amendment VII, entitled "Civil Trials," provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. Federal Rule of Civil Procedure 38(a) provides:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

3. Federal Rule of Civil Procedure Rule 50(a)(1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue.

4. Federal Rule of Civil Procedure Rule 50(a)(2) provides:

> Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

5. 28 U.S.C. § 1652 provides:

> **Sec. 1652. State laws as rules of decision**
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

6. The pertinent provisions of the Louisiana Products liability Act, La. Rev. Stat. 9:2800.51, *et seq.*, provide:

> **Sec. 2800.54. Manufacturer responsibility and burden of proof**
>
> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.
>
> B. A product is unreasonably dangerous if and only if:

(1) The product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55;

(2) The product is unreasonably dangerous in design as provided in R.S. 9:2800.56;

(3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or

(4) The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58.

C. The characteristic of the product that renders it unreasonably dangerous under R.S. 9:2800.55 must exist at the time the product left the control of its manufacturer. The characteristic of the product that renders it unreasonably dangerous under R.S. 9:2800.56 or 9:2800.57 must exist at the time the product left the control of its manufacturer or result from a reasonably anticipated alteration or modification of the product.

D. The claimant has the burden of proving the elements of Subsections A, B and C of this Section.

Sec. 2800.53. Definitions

.....

(7) "Reasonably anticipated use" means a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances.

.....

Sec. 2800.56. Unreasonably dangerous in design

A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:

(1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and

(2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

Sec. 2800.57(A). Unreasonably dangerous because of inadequate warning

A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

7. Louisiana Civil Code article 2323 provides:

Art. 2323. Computation of damages

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.